

**Matter of Social Serv. Empls. Union, Local 371, Dist.
Council 37, AFSCME v New York City Health &
Hosps. Corp., Harlem Hosp. Ctr.**

2012 NY Slip Op 31641(U)

June 15, 2012

Sup Ct, NY County

Docket Number: 113157/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C.
Justice

PART 5

Index Number : 113157/2011
S.S.E.U, LOCAL 371
vs.
NYC HEALTH AND HOSPITAL
SEQUENCE NUMBER : 001
CONFIRM AWARD

INDEX NO. _____
MOTION DATE 5/22/12
MOTION SEQ. NO. _____

col. #176

The following papers, numbered 1 to 3, were read on this motion to/for confirm arbitration award

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ~~ORDER~~ JUDGMENT**

RECEIVED

JUN 20 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/15/12
JUN 15 2012

BJ, J.S.C.
BARBARA JAFFE

- 1. CHECK ONE: CASE DISPOSED NON-FORMAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Arbitration of Certain Controversies
Between:

SOCIAL SERVICE EMPLOYEES UNION, LOCAL
371, DISTRICT COUNCIL 37, AFSCME, on behalf
of its member, IVELISSE CAPPELAN,

Petitioner,

-against-

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, HARLEM HOSPITAL CENTER,

Respondent.

-----X
In the Matter of the Application of:

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,

Petitioner,

For an Order and Judgment Pursuant to Article 75
of the Civil Practice Law and Rules,

-against-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL
371, and IVELISSE CAPPELAN,

Respondents.

-----X
BARBARA JAFFE, JSC:

For Local 371:
Jeffrey L. Kreisberg, Esq.
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New York, NY 10038
212-629-4970

For HHC:
Maxwell D. Leighton, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street, Room 2-143
New York, NY 10007-2601
212-788-0407

Index Nos. 113157/11

Argued: 5/22/12
Motion Seq. Nos.: 001,
Motion Cal. Nos.: 176

DECISION & JUDGMENT

UNFILED JUDGMENT

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JUN 20 2012
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NYS SUPREME COURT - CIVIL

By notice of petition dated November 14, 2011, petitioner New York City Health and Hospitals Corporation (HHC) moves pursuant to CPLR 7511 for an order vacating the arbitration award in the grievance brought by respondent Ivelisse Cappelán.

By notice of petition dated November 16, 2011, petitioner Social Service Employees Union, Local 371, District Council 37, AFSCME (Local 371), on behalf of its member, Cappelán, moves pursuant to CPLR 7510 for an order confirming the arbitration award.

The scope of judicial review of an arbitration proceeding is extremely limited (*Matter of Campbell v New York City Tr. Auth.*, 32 AD3d 350 [1st Dept 2006]), and the court must give deference to the arbitrator's decision (*Matter of New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d 332 [2005]). In reviewing an award, the court is bound by the arbitrator's factual findings and interpretations of the agreement at issue (*Matter of Brown & Williamson Tobacco Corp. v Chesley*, 7 AD3d 368 [1st Dept 2004]), and may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (*Matter of New York State Correctional Officers & Police Benevolent Assn., Inc. v State of New York*, 94 NY2d 321, 326 [1999]).

Pursuant to CPLR 7511(b)(iii), an arbitration award may be vacated if, as pertinent here, the arbitrator "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." An award will not be vacated on this ground unless the party seeking vacatur demonstrates that it is totally irrational, violates public policy, or exceeds a specifically enumerated limitation on the arbitrator's power. (*Matter of Kowaleski v New York State Dept. of Correctional Servs.*, 16 NY3d 85 [2010]; *Matter of New York City Tr.*

Auth. v Transp. Workers Union of Am., Inc., Local 100, et al., 14 NY3d 119 [2010]).

If a motion to vacate an arbitration award is denied, the court must confirm it. (CPLR 7511[e]).

I. IS THE AWARD IRRATIONAL?

An award is “rational” if “any basis for [its] conclusion is apparent to the court” (*Caso v Coffey*, 41 NY2d 153, 158 [1976]), and may be found irrational only if there is no proof to justify it (*Matter of Cherry v New York State Ins. Fund.*, 83 AD3d 446 [1st Dept 2011]; *Matter of Peckerman v D&D Assocs.*, 165 AD2d 289 [1st Dept 1991]).

A. Characterization of pre-charge suspension as disciplinary penalty

Here, Cappelan was employed as an “Addiction Counselor Level II,” with the duties of, *inter alia*, counseling patients in an HHC drug and alcohol addiction treatment program, formulating their treatment plans, and managing their records, including the logging, storage, and transport of their medications. (HHC Ver. Pet., Exhs. 1, 2). After allegedly violating internal HHC protocol by mishandling a patient’s medication and obtaining a prescription for a patient no longer participating in the program, Cappelan was suspended for 30 days without pay. (*Id.*, Exh. 1). After returning to work, it was discovered that she may also have violated internal HHC protocol by accepting a gift from a patient. (*Id.*). She was then charged with six specifications, five arising from her alleged mishandling and improper dissemination of medication, and one arising from her alleged acceptance of a gift. (*Id.*, Exhs. 1, 3). Thereafter, she was terminated. (*Id.*).

The parties stipulated to the issue for the arbitrator’s determination as follows: “Was the suspension of [Cappelan] from her position . . . and her subsequent discharge . . . a wrongful

disciplinary action?" (*Id.*, Exh. 1). Concluding that Cappelán had negligently mishandled and improperly disseminated medication, the arbitrator determined that her suspension was not an improper disciplinary action. (*Id.*). However, as he found that she had not accepted a gift from a patient, and thus, that the only misconduct she had committed was that which led to her suspension, he concluded that her termination was wrongful and that she should be reinstated and awarded back pay and benefits of the date of her termination. (*Id.*).

As the parties characterize Cappelán's suspension as a disciplinary action in specifying the issue for the arbitrator's determination, and as the collective bargaining agreement between HHC and Local 371 is silent as to whether or not a suspension pending preference of charges constitutes a disciplinary action (Local 371 Ver. Pet., Exh. A), absent authority for the proposition that a pre-charge suspension is not a disciplinary penalty, HHC has failed to demonstrate that the arbitrator's characterization of petitioner's suspension as a penalty is irrational.

B. Reinstatement

An arbitrator's decision to reinstate a grievant's employment has been considered irrational if it permits the grievant to re-offend. (*See Matter of Social Servs. Empls. Union, Local 371, obo Robinson v City of New York Dept. of Juvenile Justice*, 82 AD3d 644 [1st Dept 2011]; *Matter of Social Servs. Empls. Union, Local 371, obo Opuoru v City of New York Admin. for Children's Servs.*, 56 AD3d 322 [1st Dept 2008]; *see also Matter of City School Dist. of the City of New York v Campbell*, 20 AD3d 313 [1st Dept 2005]).

Here, Cappelán neither committed a crime nor used information or property obtained through her employment for personal gain, and insofar as her mishandling of medication is

concerned, she was found to have acted negligently, not intentionally. Moreover, Cappelán's position does not require her to counsel patients against committing the same offenses that she committed. Absent authority for the proposition that an employee guilty of misconduct may never be reinstated to the same position held when she committed the misconduct, HHC has failed to demonstrate that the arbitrator's decision to reinstate Cappelán's employment is irrational.

C. Back pay and benefits

In awarding Cappelán back pay and benefits as of the date of her termination, the arbitrator considered whether she was obligated to mitigate her damages by seeking alternative employment and concluded, on the basis of her testimony regarding her job search efforts, which he found credible, and the high rates of unemployment, that she acted reasonably in searching for work. (HHC Ver. Pet., Exh. 1).

As the arbitrator relied on the record and set forth his reasoning in support of his determination, and given the limited scope of my review, HHC has failed to show that the award of back pay and benefits is irrational. (*See supra*, I.).

II. DOES THE AWARD VIOLATE PUBLIC POLICY?

An award may not be vacated on public policy grounds unless it is clear on its face that public policy precludes its enforcement. (5 NY Jur 2d, Arbitration and Award § 226). In other words, the court must be able to examine an award on its face, without engaging in extensive fact-finding or legal analysis, and determine that it may not be enforced on the ground that it violates public policy. (*Matter of Sprinzen v Nomberg*, 46 NY2d 623 [1979]). The public policy at issue must be strong, well-defined, and embodied in constitutional, statutory or common law,

and must prohibit a particular matter from being decided or certain relief from being granted by an arbitrator. (5 NY Jur 2d, Arbitration and Award § 226).

As the award is not facially violative of public policy, and as HHC identifies no case, statute, or constitutional provision providing that public policy precludes reinstatement of an employee found guilty of negligently mishandling and improperly disseminating medication, public policy provides no basis for vacating the award.

III. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition for an order vacating the award is denied; and it is further

ADJUDGED, that the petition for an order confirming the award ordering petitioner/respondent New York City Health and Hospitals Corporation to reinstate Ivelisse Cappelán and award her back pay and benefits, less any amounts earned by her since her termination that could not have been earned had she continued in the position and any Unemployment Compensation benefits she received from the date of her termination to the date of her reinstatement, is granted; and it is further

ADJUDGED, that petitioner/respondent New York City Health and Hospitals Corporation shall reinstate Ivelisse Cappelán and award her back pay and benefits, less any amounts earned by her since her termination on June 21, 2010 that could not have been earned had she continued in the position she held prior to June 21, 2010 and any Unemployment Compensation benefits she received from the date of her discharge to the date of her reinstatement; and it is further

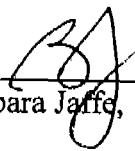
ADJUDGED, that petitioner Social Service Employees Union, Local 371, District

Council 37, AFSCME, on behalf of its member, Ivelisse Cappelán, having an address at 817 Broadway, New York, New York 10003, does recover from respondent New York City Health and Hospitals Corporation, having an address at 125 Worth Street, New York, New York 10013, costs and disbursements in the amount of \$ _____, as taxed by the Clerk, and that petitioner has an execution therefor.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: June 15, 2012
New York, New York

JUN 15 2012